



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 1886-99
19 January 2001

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the United States Navy filed an application with this Board requesting that the nonjudicial punishment (NJP) of 27 May 1998 be removed from his record.

2. The Board, consisting of Mr. Brezna, Mr. Hogue and Ms. Humberd, reviewed Petitioner's allegations of error and injustice on 9 January 2001 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 30 January 1998 in the rate of IC1 (E-6). During his prior period of service, Petitioner compiled an excellent record and apparently had no disciplinary infractions.

d. On 28 March 1998 Petitioner received NJP for disobedience. The punishment imposed was forfeitures of pay totaling \$400 and a reduction in rate to IC2 (E-5), which was suspended for six months. On 27 May 1998 he received another NJP for use of cocaine. The punishment imposed was a reduction in rate to IC2. On 29 July 1998 Petitioner's appeal of the NJP was denied. In taking such action, the appeal authority considered but rejected a statement from a Ms. Sharyn L. K. to the effect

that Petitioner drank from her cocaine laced cocktail, and thus tested positive on the urinalysis.

e. Based on the NJP for use of cocaine, Petitioner was processed for an administrative discharge. An administrative discharge board (ADB) met on 14 September 1998. During the ADB Petitioner contended that he must have picked up the wrong drink and unknowingly ingested cocaine. An expert from the Navy drug laboratory testified to the effect that the level of cocaine in Petitioner's urine sample was not inconsistent with ingesting the cocaine in an alcoholic beverage. However, based on the urine sample, Petitioner could have ingested cocaine either knowingly or unknowingly. A senior chief testified that Petitioner was an outstanding performer and did not believe that he would use drugs.

f. Ms. K. testified under oath that she was friends with Petitioner and his family and was with them at a Holiday Inn. She testified that she had a very serious cocaine problem and was putting cocaine into her rum and coke. During the evening, she noted that her drink did not have cocaine in it and she was afraid that someone else had her cocaine laced drink. When she learned that Petitioner had tested positive for cocaine, she immediately told Petitioner's wife that her drink must have been switched at the Holiday Inn.

g. Petitioner's wife testified under oath what Ms. K had told her. She also testified, in part, as follows:

There was a bar and the pool was an indoor/outdoor pool. I was drinking diet coke and (my husband) was drinking rum and coke. While we were at the pool it was so busy and we had to sit with two other couples we met there. (Ms. K) loves my children and she was in the pool with them. We moved to the more shallow pool area outside the Holiday Inn because my two year old son could not swim in the deep area and the outside pool has a shallow area for him to play in. (Ms K.) was drinking rum and coke. The other couples were drinking and I think they were drinking rum and cokes too. The two couples helped us move to the outside pool area. I knew that my coke was diet and that it did not have any liquor in it. After we moved to the outside pool (my husband) said his drink seemed very strong and asked if he could have some of my Diet coke.
.....

About 20 to 30 minutes later (my husband) told me he felt like he was having a heart attack

h. On 14 September 1998 the ADB found that Petitioner had not committed misconduct and recommended his retention in the Navy. Consequently, Petitioner continues to serve on active duty. On 8 January 1999 Petitioner's was granted a top secret clearance.

i. Petitioner states that after the ADB he requested that the NJP be set aside. He was apparently told by the commanding officer that if he passed a polygraph it would be set aside. Petitioner states that he did not take a polygraph on the advice of counsel.

CONCLUSION:

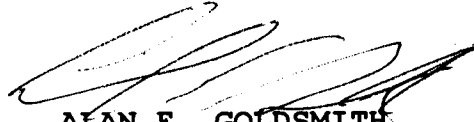
Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants favorable action. The Board carefully reviewed all of the evidence in the case, especially the statement of Ms. K and her testimony at the ADB. The Board believes that the ADB correctly concluded that Petitioner did not knowingly use cocaine and did not commit misconduct. In this regard, the Board notes his fine record of prior service, the sworn testimony of Ms. K that she was responsible for Petitioner's unknowing ingestion of cocaine, and the medical evidence to the effect that a positive urinalysis could have resulted from her action. Given this belief, the Board concludes that the NJP of 27 May 1998 for use of cocaine and any related material should be removed from Petitioner's naval record.

RECOMMENDATION:

- a. That Petitioner's naval record be corrected by removing the NJP of 27 May 1998 and all related documentation.
 - b. That Petitioner naval record be further corrected to show that he was not reduced from ET1 (E-6) to ET2 (E-5) on 29 July 1998.
 - c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.
 - d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.
4. It is certified that a quorum was present at the Board's

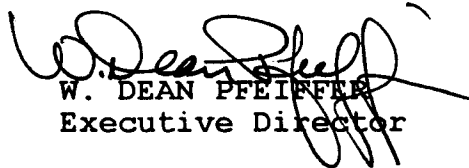
review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director